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No. 76-1058

In the Supreme Court of the United States

OCTOBER TERM, 1976

CENTRAL ILLINOIS PUBLIC SERVICE COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES

The question presented in this federal income tax case is whether amounts paid by petitioner to reimburse its employees for their noon meal expense incurred on non-overnight travel constituted "wages" within the meaning of Section 3401(a) of the Internal Revenue Code of 1954 (26 U.S.C.), from which income taxes are required to be withheld under Section 3402 of the Code.

Petitioner is a public utility which supplies electricity and natural gas to an extensive area of downstate Illinois. Its employees are often required to make day trips away from their home base during normal business hours.[1]

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[1]At times, petitioner's employees also are away from their home base overnight on business. Those trips are not at issue (see Pet. App. B 11a, n. 3).

When petitioner's employees engage in such non-overnight travel, petitioner reimburses them for amounts theoretically expended for their noonday meal up to certain fixed limits (Pet. App. B 7a).

During 1963, union employees and operating employees of the Western Division (petitioner's only non-unionized division) received a flat rate of $1.40 per noonday meal. This amount is provided for in the union's collective bargaining agreement with petitioner. The full $1.40 could be, and often was, claimed regardless of the amount the employee actually spent on lunch. In some cases, the employee claimed the reimbursement even when he brought his lunch from home. Salaried employees, on the other hand, were reimbursed for their actual meal expense up to $25.00 (Pet. App. B 7a).

During 1963, petitioner paid its employees $139,936.12 as reimbursement for such noonday meals but did not withhold income tax from that amount (Pet. App. B 7a). On audit, the Internal Revenue Service determined that petitioner should have withheld and paid over $36,615.72 from the amounts paid to its employees as meal reimbursements because such amounts constituted "wages" under Section 3401(a) of the Code (*ibid.*).

In this refund suit brought by petitioner in the United States District Court for the Southern District of Illinois, the district court held that the meal payments were not "wages" and that petitioner was not required to withhold income taxes from them (Pet. App. A 1a-4a). The court of appeals unanimously reversed (Pet. App. B 5a-12a). In its view, "the lunch reimbursements are part of a total package of remuneration designed to attract and hold good employees to the company. As such, they must be considered 'wages' under 26 U.S.C. §3401(a) for withholding tax purposes" (Pet. App. B 11a).

As the court of appeals acknowledged (Pet. App. B 11a) and petitioner argues (Pet. 4), its decision holding that payments to employees for meals constitute "wages" under Section 3401(a) conflicts with *Royster Company* v. *United States*, 479 F. 2d 387 (C.A. 4). There, the court held that amounts paid to salesmen to reimburse them for the cost of meals consumed in non-overnight travel were not "wages" subject to withholding because "they got the free lunch whether they made any sales that day or not * * * [and] * * * performed no services during lunch hour" (479 F. 2d at 391-392). But "wages" cannot be defined so narrowly. Section 31.3401(a)-1(a) of the Treasury Regulations on Employment Taxes (26 C.F.R.) defines "wages" as "all remuneration for services performed by an employee for his employer * * *." Here, as in *Royster*, the lunch reimbursements are part of the employee's total remuneration for his services in the same way that vacation pay constitutes "wages."

We are advised by the Internal Revenue Service that the question whether such meal payments are "wages" has substantial administrative importance. There are 295 cases presently pending administratively with approximately $10,350,000 of revenue at stake. Moreover, it is believed that even larger amounts of revenue are involved because many recipients of such payments do not report them as income if they do not appear on their W-2 forms as wages paid by their employers.

Because of the conflict and the importance of the issue,[2] we do not oppose the granting of certiorari with

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[2]A related question is presently before the Court in *Kowalski* v. *Commissioner*, 544 F. 2d 686 (C.A. 3), certiorari granted, March 28, 1977, No. 76-1095. The issue in that case is whether cash meal allowances paid to state police troopers are includable in "gross income" under Section 61(a) or otherwise excludable under Section 119. We

respect to the first question presented in the petition.[3]

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

APRIL 1977.

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are serving a copy of this memorandum upon counsel for the respondent in *Kowalski* and upon counsel for the respondent in *United States* v. *Smith*, No. 76-1243, petition for a writ of certiorari pending, which presents only the Section 119 issue.

[3]Petitioner presents a second question whether the Commissioner may "retroactively" impose the obligation to withhold taxes from payments "subsequently" determined to be "wages." There is, however, no basis for review of this question. The Commissioner is free to determine deficiencies in taxes for all open years regardless of the taxpayer's belief in the correctness of its position. Moreover, given the broad regulatory definition of "wages," petitioner had no reason to believe that the lunch payments were not subject to withholding. Indeed, none of the cases cited by petitioner (Pet. 7) involves the question whether meal payments are "wages." We therefore oppose the petition with respect to this second question.